BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSHUA KEEVER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,013,707
PAYLESS SHOESOURCE	)	
Respondent	)	
AND	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Both claimant and respondent appeal the January 27, 2005 Award of Administrative Law Judge Brad E. Avery. Claimant was awarded benefits for a 29 percent permanent partial general disability based upon a 43 percent wage loss and a 15 percent task loss. Oral argument was held July 12, 2005.

APPEARANCES

Claimant appeared by and through his attorney, George H. Pearson of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, James C. Wright of Topeka, Kansas.

RECORD AND STIPULATIONS

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. In addition, the parties have submitted a Stipulation regarding the amount of temporary total disability compensation paid. In their Stipulation Regarding Credit On Award, the parties acknowledged claimant

was paid 11 weeks temporary total disability compensation at the rate of $287.03 per week totaling $3,157.33. This number will be utilized in computing the final award in this matter.[1]

ISSUES

1. What is the nature and extent of claimant's injury? More particularly, what is claimant's task and wage loss under K.S.A. 44-510e? Does claimant's failure to accept the work hardening program offered by respondent negate his entitlement to a permanent partial general work disability under K.S.A. 44-510e?

2. What is claimant's post-injury average weekly wage?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds as follows:

Claimant was hired by respondent in the Kozan Department on March 27, 2001. In February of 2002, he was transferred to shipping, which involved loading cases of shoes into semi trailers four days a week 10 hours per day. Claimant was required to load between 275 and 300 cases per hour, with the cases averaging between 30 and 40 pounds each. Claimant began experiencing problems with the bottoms and sides of his elbows in both arms prior to February 2002. Claimant originally thought these pains were just the usual aches and pains associated with performing manual labor and did not seek medical treatment. Approximately six months after switching to shipping, claimant began experiencing pain on the tops of both arms in addition to the pain he was already experiencing on the bottoms and the sides of his elbows. Claimant testified that the pace at which he was required to work was a significant part of the problem. By August 6, 2003, the pain had become so unbearable that claimant could not perform his job satisfactorily.

Claimant notified his supervisor and was referred to St. Francis Hospital for medical treatment, where he came under the care of Dr. Mead. Claimant was later transferred to the care of John H. Gilbert, M.D., board certified orthopedic surgeon, at Kansas Orthopedic & Sports Medicine, whom he first saw on September 25, 2003. Claimant was placed on light duty with no lifting in excess of 35 pounds, no repetitive hand activities and no pushing or pulling. Dr. Gilbert diagnosed claimant with upper extremity and hand complaints secondary to hand-intensive labor. He later gave claimant permanent work restrictions and

[1] The Stipulation filed with the Workers Compensation Division does not state which dates are included in this 11-week period.

assessed claimant a 15 percent loss of task performing abilities after reviewing the task list prepared by vocational expert Dick Santner, finding claimant incapable of performing five of the thirty-four tasks on Mr. Santner's list. Claimant last worked his regular job on January 15, 2004, starting light duty on January 16, 2004. He was terminated from his position on April 14, 2004, based upon respondent's policy that employees are only allowed to remain on the light duty for 90 days. After 90 days, if an employee is not able to be released to regular duty, then termination becomes mandatory.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., with the first examination on December 15, 2003, and a second examination on March 2, 2004. Dr. Prostic agreed with the restrictions placed upon claimant by Dr. Gilbert. Dr. Prostic rated claimant at 10 percent impairment to each upper extremity, which combine for a 12 percent impairment to the body as a whole based upon the fourth edition of the AMA *Guides.*[2] He opined claimant was incapable of performing eleven of the thirty-four tasks on Mr. Santner's list, for a 32 percent task loss.

Claimant was referred to Peter V. Bieri, M.D., board certified in disability evaluations, for an independent examination at the referral of the Administrative Law Judge (ALJ). Dr. Bieri examined claimant on October 29, 2004, assessing claimant a 2 percent impairment to the whole person based upon the fourth edition of the AMA *Guides* for residuals of bilateral epicondylitis. He restricted claimant to occasionally lifting 35 pounds, frequently lifting 15 pounds and no more than 7 pounds of constant lifting, and recommended avoiding repetitive hand activities, pushing and pulling within pain tolerances. He advised that it was not appropriate for claimant to perform the same activities that had caused the original problems. Originally, Dr. Bieri was provided a task list prepared by Mr. Santner which contained twenty-eight tasks. Of those twenty-eight tasks, Dr. Bieri opined that claimant was incapable of performing nine which resulted in a 32 percent task loss. However, after meeting with respondent's attorney, at which time Dr. Bieri was provided with an addendum adding six tasks to the list for a total of thirty-four tasks, Dr. Bieri determined that claimant was able to perform tasks 5, 14 and 25, changing his answers from no to yes on those three tasks for a total of six tasks that Dr. Bieri opined claimant was incapable of performing. However, while those three tasks all exceeded the lifting requirements in Dr. Bieri's restrictions, Dr. Bieri stated that it was inconsistent to disqualify those tasks strictly based upon the weights as opposed to repetitive activities, stating that claimant had normal strength. Dr. Bieri did not reexamine claimant prior to changing his opinion on claimant's task loss, with nothing occurring other than his meeting with respondent's attorney.

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[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant was evaluated by board certified orthopedic surgeon Phillip L. Baker, M.D., at the request of respondent's attorney on June 24, 2004. Dr. Baker opined claimant had no permanent impairment and stated that with four to six weeks of work hardening, claimant should be able to return to full duty at the same job he was working with respondent. This work hardening program was offered to claimant with a potential return to work for respondent once the work hardening program was completed. Claimant, after reviewing the offer, rejected same, concluding it would be inappropriate to return to the same job which caused him the physical problems originally. The Board agrees, finding this work hardening offer by respondent violated the restrictions of Drs. Bieri, Prostic and Gilbert. The Board concludes respondent's offer was not made in good faith.

Claimant began working for Squeegee Clean at $8 per hour on July 21, 2004. Claimant testified in his deposition that he was expected to be available for work on a 40-hour per week basis.[3] It was also noted in the record that, during the eleven weeks he worked for Squeegee Clean,[4] claimant earned $160.08 in overtime, which computes to $14.55 per week.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[5] With regard to claimant's functional impairment, the Board has considered the opinions of both Dr. Bieri and Dr. Prostic. The Board finds neither opinion to be more persuasive than the other and assesses claimant a 7 percent impairment to the body as a whole on a functional basis after averaging the 2 percent impairment of Dr. Bieri with the 12 percent impairment of Dr. Prostic.

The Board additionally finds claimant's date of accident to be January 15, 2004, the last day claimant worked his regular job before being placed on light duty.[6]

K.S.A. 44-510e defines permanent partial general disability as,

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period

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[3] Claimant's Depo. at 28.

[4] This period of 11 weeks is the 11-week period covered by the pay stubs from Squeegee Clean contained in Exhibit 3 to claimant's deposition taken on December 6, 2004.

[5] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

[6] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

> preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

In this instance, there are three task loss opinions in the record. Dr. Gilbert found, based upon Mr. Santner's list, that claimant has a 15 percent task loss, having lost the ability to perform five of thirty-four tasks. Dr. Prostic found claimant incapable to performing eleven of the thirty-four tasks, for a 32 percent task loss. Dr. Bieri originally, based on a list containing twenty-eight tasks, found claimant to have a 32 percent task loss, but after a meeting with respondent's attorney, at which time Dr. Bieri was provided with an addendum adding six tasks to the list for a total of thirty-four tasks, Dr. Bieri found three tasks from the original list which he felt claimant capable of performing, even though they appear to exceed his weight lifting restrictions, thereby reducing his task loss opinion to 17.6 percent. The Board does not find the second opinion of Dr. Bieri to be as credible or as persuasive as the opinion of Dr. Gilbert or Dr. Prostic. There is no explanation why Dr. Bieri would modify his task loss opinion, allowing claimant to perform work which appeared to exceed his restrictions. The Board, therefore, rejects that opinion, considering instead the opinions of Dr. Gilbert at 15 percent and Dr. Prostic at 32 percent. The Board finds no justification in placing greater weight on the opinion of either Dr. Gilbert or Dr. Prostic and, therefore, averages the opinions of both, finding claimant has a task loss of 23.5 percent.

The parties stipulated to pre-injury average weekly wages both through and after January 15, 2004 ($467.48 through January 15, 2004, and $514.39 thereafter), with the later wage to include fringe benefits. There is, however, a dispute with regard to claimant's post-injury average weekly wage. Claimant testified in his deposition on December 6, 2004, that he had obtained a job with Squeegee Clean, being paid $8 per hour. While claimant's wage records do not show claimant working regularly on a 40-hour week, he did acknowledge that he was expected to be available for work on a 40-hour week basis. K.S.A. 2003 Supp. 44-511, in computing the average weekly of workers, defines the term "wage" as meaning,

> . . . the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment.[7]

[7] K.S.A. 2003 Supp. 44-511(a)(3).

In *Slack*,[8] the Kansas Court of Appeals held that, in computing a claimant's average weekly wage, considering hourly wage, overtime and fringe benefits,

> All three items constitute a part of claimant's wage and, therefore, must necessarily be included in the computation of claimant's average weekly wage, both before and after the disability."[9]

Additionally, in *Tovar*,[10] the Court of Appeals analyzed the language of K.S.A. 1990 Supp. 44-511 which, when considering the average weekly wage of an employee whose wage is based upon an hourly rate, states,

> (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, ...[11]

The fundamental rule by which we are governed is that the purpose and intent of the legislature governs when that intent can be ascertained from the statutes.[12]

In *Tovar*, the claimant testified to working 40 hours per week, but also testified that he was expected to maintain Saturdays and be available on Saturdays, even though he did not regularly work every single Saturday. The court in *Tovar* went on to hold that the compensation rate was to be based upon the number of days an employee was expected to work or regularly works. The court then found that the claimant's average weekly wage was to be computed based upon a six-day week rather than the normal five-days-a-week 40-hours-per-week wage. In this instance, claimant testified that he is regularly expected to be available on a 40-hour-week basis. Based upon K.S.A. 2003 Supp. 44-511 and *Tovar*, the Board finds claimant's post-injury average weekly wage to be $8 per hour times a 40-hour week, or $320 regular pay, plus $14.55 overtime, for a total of $334.55. This, when compared to claimant's average weekly wage of $514.39, results in a wage loss of 35 percent. When averaged with claimant's task loss of 23.5 percent, this results in a 29.25 percent permanent partial general disability under K.S.A. 44-510e.

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[8] *Slack v. Thies Development Corp.*, 11 Kan. App. 2d 204, 718 P.2d 310, *rev. denied* 239 Kan. 628 (1986).

[9] *Id.* at 207.

[10] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[11] K.S.A. 2003 Supp. 44-511(b)(4)(B).

[12] *Tovar* at 787; *Nordstrom v. City of Topeka*, 228 Kan. 336, ¶ 1, 613 P.2d 1371 (1980).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Brad E. Avery dated January 27, 2005, should be, and is hereby, modified to award claimant a 7 percent impairment to the body as a whole on a functional basis,[13] followed by a permanent partial general disability of 29.25 percent based upon an average weekly wage of $514.39 and an accident date of January 15, 2004.

The Board further incorporates the Stipulation of the parties that claimant has been paid and respondent is entitled to credit for 11 weeks compensation paid at the rate of $287.03 per week totaling $3,157.33. The Board notes that for a January 15, 2004 date of accident, the maximum temporary disability rate would be $440 per week. Based upon a $514.39 wage, claimant would be entitled to temporary total disability compensation and permanent partial general disability compensation at the rate of $342.94 per week. This represents an underpayment of $55.91 per week for 11 weeks totaling $615.01.

Claimant is, therefore, awarded 11 weeks temporary total disability compensation at the rate of $342.94 per week totaling $3,772.34, followed thereafter by 121.39 weeks permanent partial general disability compensation at the rate of $342.94 per week totaling $41,629.49 for a 29.25 percent permanent partial general disability, for a total award of $45,401.83.

As of August 19, 2005, there is due and owing claimant 11 weeks of temporary total disability compensation at the rate of $342.94 per week totaling $3,772.34, followed by 72.14 weeks of permanent partial compensation at the rate of $342.94 per week totaling $24,739.69, for a total due and owing of $28,512.03, which is ordered paid in one lump sum minus any amounts previously paid. The remaining balance of $16,889.80 is to be paid for 49.25 weeks at the rate of $342.94 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

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[13] Claimant is limited to his functional impairment for the period from January 15, 2004, through April 14, 2004, his last day worked for respondent, as he had returned to work at an accommodated position at a comparable wage. Beginning April 15, 2004, claimant's permanent partial general disability under K.S.A. 44-510e will take effect.

Dated this ____ day of August 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
James C. Wright, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director